

Sines, et al. v. Kessler, et al., 3:17CV72, 11/19/2021

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ELIZABETH SINES, ET AL., CIVIL CASE NO.: 3:17CV72
NOVEMBER 19, 2021, 9:00 AM
JURY TRIAL, DAY 20

Plaintiffs,

vs.

Before:

HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF VIRGINIA

JASON KESSLER, ET AL.,

Defendants.

APPEARANCES:

For the Plaintiffs: ALAN LEVINE, ESQUIRE
COOLEY LLP
1114 Avenue of the Americas, 46th
Floor
New York, NY 10036
212.479.6260

DAVID E. MILLS, ESQUIRE
COOLEY LLP
1299 Pennsylvania Avenue, NW,
Suite 700
Washington, DC 20004
202.842.7800

Court Reporter: Lisa M. Blair, RPR, RMR, CRR, FOCR
255 West Main Street, Suite 304
Charlottesville, Virginia 22902
434.296.9284

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1 APPEARANCES CONTINUED:

2 For the Plaintiffs:

MICHAEL L. BLOCH, ESQUIRE
EMILY C. COLE, ESQUIRE
ROBERTA A. KAPLAN, ESQUIRE
Kaplan Hecker & Fink LLP
350 Fifth Avenue, Suite 7110
New York, NY 10118
212.763.0883

6 For the Defendants:

DAVID L. CAMPBELL, ESQUIRE
Duane, Hauck, Davis, Gravatt &
Campbell, P.C.
100 West Franklin Street, Suite 100
Richmond, VA 23220
804.644.7400

CHRISTOPHER CANTWELL, PRO SE
#00991-509
USP Marion
4500 Prison Road, PO Box 2000
Marion, IL 62959

BRYAN J. JONES, ESQUIRE
Bryan J. Jones, Attorney at law
106 W. South Street, Suite 211
Charlottesville, VA 22902
540.623.6952

JAMES E. KOLENICH, ESQUIRE
Kolenich Law Office
9435 Waterstone Blvd., Suite 140
Cincinnati, OH 45249
513.444.2150

JOSHUA SMITH, ESQUIRE
Smith LLC
807 Crane Avenue
Pittsburgh, PA 15216
917.567.3168

WILLIAM E. REBROOK, IV, ESQUIRE
(Appearing via Zoom)
The ReBrook Law Office
6013 Clerkenwell Court
Burke, VA 22015
571.215.9006

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1 APPEARANCES CONTINUED:

2 For the Defendants:

RICHARD SPENCER, PRO SE

P.O. Box 1676

3 Whitefish, MT 59937

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1 (Proceedings commenced, 9:00 a.m.)

2 THE COURT: Call the case, please.

3 THE CLERK: Yes, Your Honor. This is Civil Action
4 Number 3:17-cv-72, Elizabeth Sines and others versus Jason
5 Kessler and others.

6 THE COURT: All right. Before we begin, I will
7 remind everyone that under Standing Order 2020-12, 2013-8, the
8 Court's prohibition against recording or broadcasting court
9 proceedings remains in force. Attorneys, parties, or their
10 staff and any members of the public or press accessing this
11 proceeding today may not record or broadcast it. That means no
12 photography, no using any video or audio recording device, no
13 rebroadcasting, livestreaming, or otherwise disseminating any
14 live or recorded video or audio of this proceeding.

15 Last night the Court was informed by the U.S. Marshal
16 Service that one of the jurors, Juror 210, learned yesterday
17 that two of his children with whom he lives had been told by
18 the school to quarantine at home on account of the COVID-19
19 exposure they had yesterday. That contact happened yesterday.
20 To be clear, because the contact happened yesterday, it would
21 not have any potential impact on the juror when he was in court
22 or to the rest of the jury today; however, considering these
23 circumstances, the Court has told the juror not to come in
24 today. The Court finds that he should be excused for good
25 cause. Sickness and family emergency are grounds for excusing

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1 a juror for good cause, Federal Rule of Civil Procedure 47.

2 Further, Standing Order 2021-16 of this Court
3 reflects and acknowledges that public health agencies, in light
4 of higher COVID-19 rates over the past few months, recommend
5 the resumption of protective measures for both vaccinated and
6 unvaccinated persons; and that these measures include the
7 wearing of face masks in public indoor settings, social
8 distancing, and testing of those fully vaccinated people who
9 have a known exposure to someone with suspected or confirmed
10 COVID-19, Standing Order 2021-16.

11 This Court was not -- this juror was not vaccinated,
12 making those protective measures even more important, and that
13 given the timing of the juror's interaction with his children
14 who have been ordered to quarantine, testing would not appear
15 to be present -- to be a viable option for several days. Under
16 these circumstances, the Court found that having the juror come
17 back to begin jury deliberations with the rest of the jury
18 would present an unacceptable increased risk to the health of
19 others, and would risk impairing the full jury's ability to
20 take the time they need in deliberations without undue fear of
21 health risk.

22 That's where we are. I was hoping to get through
23 this without anything like that happening, but it did.

24 All right. Are we ready to call the jury?

25 MS. KAPLAN: We are, Your Honor.

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1 MR. CANTWELL: It's Christopher Cantwell. I have one
2 thing before we do, Judge. I fear that yesterday during
3 plaintiffs' counsel's closing arguments, Ms. Dunn in her
4 earlier portion, I feel that she badly misinformed the jury
5 about the implications of the adverse inferences against
6 Defendants Kline and Ray. I sadly have not had access to a
7 transcript yet, but the gist of it was that the Court has
8 already found that there was a conspiracy, and it's just a
9 matter of determining who they conspired with. I understand
10 there are facts deemed established against Kline and Ray and
11 that they -- and that the facts established include that they
12 conspired to commit racially motivated violence, but the
13 attempt to contain the spillover there I feel was violated by
14 saying that there is a conspiracy here. They haven't --

15 THE COURT: Well, Mr. Cantwell, I'm going to tell the
16 jury that closing arguments are not evidence in the case. I've
17 got a little thing to say. But other than that, we can't go
18 back at this point into the case.

19 All right. Call the jury.

20 **(Jury in, 9:06 a.m.)**

21 THE COURT: Good morning, ladies and gentlemen.
22 Before I read you the final jury instructions and you begin
23 your deliberations, let me tell you that one of your jurors,
24 Juror 210, learned yesterday that his children had been told by
25 their school to quarantine at home on account of a COVID-19

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1 exposure they had yesterday. The contact happened yesterday.
2 And so to be clear, it would not have any potential impact upon
3 that juror when he was in court or any of the rest of the jury
4 on that day; however, the Court determined that it was
5 appropriate to excuse Juror 210 in order to ensure the health
6 of the jury and the ability of the jury to complete its
7 deliberations.

8 At this time I would remind you of a few previously
9 given jury instructions. Specifically, the evidence in the
10 case includes the sworn testimony of the witnesses, regardless
11 of who may have called them; all exhibits received in evidence,
12 regardless who may have produced them; all depositions read or
13 played into the record, regardless of who may have introduced
14 them; and all facts which may have been admitted or stipulated
15 to. And that would also include the facts that I found that
16 you should consider as proven as to certain parties, which you
17 have those instructions.

18 I would remind you also that statements, arguments,
19 and questions by lawyers are not evidence, and that that
20 includes closing arguments are not evidence. It's only to help
21 the lawyer to argue their side of the case and explain to you
22 their point of view as to how the facts apply to the law -- or
23 the law applies to the facts.

24 I would also remind you that you are the judges of
25 the facts, the credibility of the witnesses, and the weight of

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1 the evidence.

2 Now I'm going to read the final instructions to you.

3 When you go to your jury room, you should first
4 select one of your number to act as your foreperson. The
5 foreperson will preside over your discussions and speak for you
6 here in court. And by speak for you in court, you will -- any
7 messages or anything like that, when you reach your verdict,
8 the foreperson will bring it back, hand it to the marshal, then
9 the clerk will read the verdict. So the foreperson will not be
10 having to make any presentation in court.

11 It is your duty as jurors to discuss this case with
12 one another in the jury and try to reach an agreement. Each of
13 you must make your own conscientious decision, but only after
14 you have considered all the evidence, discussed it fully with
15 the other jurors, and listened to the views of the other
16 jurors. Do not be afraid to change your opinion if the
17 discussion persuades you that you should. But do not make a
18 decision simply because other jurors think it is right or
19 simply to reach a verdict. Remember at all times that you are
20 the judges of the facts. Your sole interest is to seek the
21 truth from the evidence in the case.

22 If you need to communicate with me during your
23 deliberations you may send me a note to me through the marshal,
24 signed by one or more jurors. I will respond as soon as
25 possible in writing or orally in open court, if necessary. And

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1 that is we would bring all of you back to answer the question.

2 There was a question about whether a dictionary would
3 be possible. And because the words in these instructions have
4 meanings sometime in law that are not necessarily dictionary
5 definitions, what I would ask, if you need a definition, that
6 you send a note asking us to define the word for you. As you
7 know, dictionaries often have two or three meanings in any
8 particular word, but there may be the words in these
9 instructions frequently have a very particular meaning.

10 Remember that you should not tell anyone, including
11 me, how your vote stands numerically. Your verdict must be
12 based solely on the evidence and on the law that I have given
13 to you in my instructions. Your verdict must be unanimous.
14 Nothing I have said or done is intended to suggest what your
15 verdict should be. That is entirely for you to decide.

16 Finally, a form of verdict has been prepared for your
17 convenience. The verdict form is simply a written notice of
18 the decision that you reach in this case. You will take this
19 form to the jury room and when you -- when each of you has
20 agreed on the verdicts, your foreperson will fill it in -- fill
21 in the form, sign and date it, and advise the marshal or
22 bailiff that you are ready to return to the courtroom.

23 Now we will put the verdict form -- Ms. Dunn showed
24 you part of this yesterday. It's the same form that was on the
25 stand yesterday. With regard to the first claim, which is did

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1 the plaintiffs prove by a preponderance of the evidence that
2 their claim that one or more defendants engaged in a conspiracy
3 to commit racially motivated violence in violation of 42 U.S.C.
4 Section 1985(3), you should answer that yes or no. If you
5 answered -- if you unanimously found yes with regard to any
6 defendant -- of course, if it's all defendants, you would check
7 all defendants. If you unanimously found as to any of the list
8 of defendants, you would check the ones that you found that
9 apply.

10 Number two, the second claim, did plaintiffs prove by
11 a preponderance of the evidence their claim that one or more
12 defendants had knowledge of the conspiracy found in Claim 1 and
13 failed to prevent that conspiracy from taking place in
14 violation of 42 U.S.C. Section 1986? Again, your decision must
15 be unanimous, yes or no. And if you answered yes, you would
16 either say to all defendants or check off the ones to whom you
17 think that -- you've decided that applies.

18 The third claim, did plaintiffs prove by a
19 preponderance of the evidence each element of their Virginia
20 state law civil conspiracy claim? Again, if you unanimously
21 found yes or no, check. And if you found yes, you have to
22 check whether it was all defendants, or check the name of
23 those, if any, that you found liable.

24 The potential damages for the first three claims, if
25 you found in favor of the plaintiffs on any one of the first

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1 three claims, then you would come down for each plaintiff and
2 fill in the amount of compensatory damages that the plaintiff
3 is entitled to receive. If you found for the plaintiffs and
4 awarded compensatory damages, then on Number 5 you would decide
5 if you should award punitive damages; and if so, you would put
6 in the amount by the name of any defendant whom you find should
7 have to pay punitive damages.

8 On the fourth claim, racial, religious, or ethnic
9 harassment or violence, Plaintiffs Natalie Romero and Devin
10 Willis bring this claim under Virginia Code Section 8.01-42.1,
11 Virginia's racial, religious, and ethnic harassment or violence
12 statute. Please indicate by marking each appropriate line with
13 a checkmark any and all defendants against whom you find the
14 plaintiff proved their Virginia Code Section 8.01-42.1 claim.

15 If each of you found for -- for each plaintiff who
16 you found for as to Count Four, please state the total
17 compensatory damage that will fully and fairly compensate that
18 plaintiff for the resulting injuries.

19 And then 7, if you found for at least one of the
20 plaintiffs as to Claim 4, do you find that punitive damages
21 should be awarded against at least one defendant? Answer yes
22 or no. If yes, then you would insert the amount of punitive
23 damages to which you think -- which you think the defendant
24 should be -- have to pay.

25 Now, 8, the plaintiffs Natalie Romero, April Muñiz,

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1 Seth Wispelwey, Elizabeth Sines, Marissa Blair, Marcus Martin,
2 and Devin Willis also claim under Virginia Code Section
3 8.01-42.1 against Defendant James Alex Fields, Jr. Please
4 indicate by marking the appropriate line with a checkmark
5 whether you find that plaintiffs proved their Virginia Code
6 Section 8.01-42.1 claim against James Alex Fields, Jr. And you
7 answer that yes or no and then you insert the amount of
8 damages. If you answered yes, you would insert the amount of
9 damages you think the plaintiffs should recover.

10 If you found at least one plaintiff in question 8, do
11 you find that punitive damages should be awarded? That's
12 paragraph 9. Answer that yes or no. If yes, you put in the
13 amount of punitive damages you think Mr. Fields should be
14 liable for.

15 On the fifth claim, Plaintiffs Natalie Romero, April
16 Muñiz, Thomas Baker, Elizabeth Sines, Marissa Blair, and Marcus
17 Martin bring a claim for assault and battery against James Alex
18 Fields, Jr. Did those plaintiffs prove by a preponderance of
19 the evidence each element of their claim for assault and
20 battery? And if you answer -- you answer that yes or no.
21 Everything still has to be unanimous. If you answered no to
22 the question, please skip to 13. If you answered yes, proceed
23 to questions 11 and 12. For any plaintiff you found for as to
24 Claim 5, please state the total compensatory damages that will
25 fully and fairly compensate that plaintiff for the resulting

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1 injuries, and you insert the amount.

2 Paragraph 12, if you found for at least one plaintiff
3 as to Claim 5, do you find that punitive damages should be
4 awarded? Yes or no. And if yes to the first part of this
5 question, please state on the following line the total punitive
6 damages you are assessing against Defendant Fields for these
7 claims.

8 The sixth claim, intentional infliction of emotional
9 distress, Plaintiffs Natalie Romero, April Muñiz, Thomas Baker,
10 Elizabeth Sines, Marissa Blair, and Marcus Martin bring a claim
11 for intentional infliction of emotional distress against
12 Defendant James Alex Fields, Jr. Did plaintiffs prove by clear
13 and convincing evidence each element of their claim for
14 intentional infliction of emotional distress? Yes or no. And
15 if no, you go to the end. But if yes, you fill in the amount
16 in Paragraph 14 that each plaintiff is entitled to recover
17 against Mr. Fields.

18 If you found for at least one plaintiff as to Claim
19 6, do you find that punitive damages should be awarded? Answer
20 yes or no. And if you answered yes to the first part of the
21 question, please state on the following line the total punitive
22 damages you are assessing against Defendant James Alex Fields,
23 Jr. for these claims, and you stop here.

24 Members of the jury, you are to answer all of the
25 questions on the jury form. The Court has not instructed you

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1 to find against -- ultimately against anyone, but I have
2 instructed you that certain elements against all of the
3 defendants have been -- against some of the defendants have
4 been proven. And so you still look at each form -- each claim
5 and decide whether all of the elements have been proven to
6 that -- as to that particular defendant. The verdict in the
7 case is up to you.

8 All right. At this point I'm going to allow you to
9 go to the jury room. You'll have in the jury room a copy --
10 each juror will have a copy of the instructions.

11 I've got one more instruction to read to you. But
12 anyway, each juror will have a copy of the verdict form. Each
13 juror will have a copy of all the instructions. I think you
14 can work better if you do. But the foreperson should remember
15 to have his or her copy available to be brought back into the
16 courtroom.

17 I will tell you now that any verdict must represent
18 the considered judgment of each juror. In order to return a
19 verdict, it is necessary that each juror agree thereto. In
20 other words, your verdict for each claim must be unanimous.
21 Each claim should be considered separately. The failure to
22 reach a unanimous verdict for one claim does not preclude you
23 from reaching a unanimous verdict as to another claim. It is
24 your duty as jurors to consult with one another and to
25 deliberate in an effort to reach an agreement if you can do so

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1 without violence to individual judgment. Each of you must
2 decide the case for yourself, but only after an impartial
3 consideration of all the evidence in the case with your fellow
4 jurors. In the course of your deliberations, do not hesitate
5 to re-examine your views and change your opinion if convinced
6 it is erroneous, but do not surrender your honest conviction as
7 to the weight or effect of the evidence solely because of the
8 opinion of your fellow jurors, or for the mere purpose of
9 returning a verdict.

10 Remember, at all times you are not partisans. You
11 are judges; judges of the facts. Your sole interest is to seek
12 the truth from the evidence in the case.

13 Now, I did tell you yesterday we're going to work
14 from 9 to 5. If the jury decides -- and that means if all of
15 you decide you want to go -- change the schedule a little bit,
16 that's okay, but generally the default is from 9 to 5. But if
17 you get to a point where you think you can work an hour or so
18 and finish things up, that will be fine, but just let us know.
19 If you do not plan to stop at 5, let us know so we can prepare
20 for that eventuality.

21 All right. You may retire now to the jury room.

22 **(Jury out, 9:24 a.m.)**

23 THE COURT: Anything before --

24 MS. KAPLAN: Not for us, Your Honor.

25 THE COURT: Oh, you're going to have somebody

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1 downstairs?

2 MS. KAPLAN: Yeah, we're going to wait on the second
3 floor.

4 THE COURT: All right. And you all have somebody?

5 MR. KOLENICH: Yes, Your Honor.

6 THE COURT: Okay. I did have a note. One of the
7 things -- I probably inartfully tried to answer one of the
8 juror -- I got this note from the marshal this morning. Juror
9 165 -- 164 wrote, "The Court said Robert Ray and Elliott Kline
10 has entered into an agreement to conspire in violence on August
11 11th and 12th. Is compensation the only decision we need to
12 make?"

13 I think it's still up to the jury to determine that.

14 And then Matthew Heimbach was brought up concerning
15 the same thing above. "Did the Court decide on this or do the
16 jurors decide?"

17 And then 165 asked if she could keep her notes after
18 the case is over. And I don't see any reason why not. Might
19 want to write a book.

20 Okay. We'll be in recess until the jury returns.

21 (Recess, 9:26 a.m. to 10:45 a.m.)

22 THE COURT: This is a real simple thing, I think.
23 The jury wants to know -- Juror Number 275 signed this -- "Can
24 we get a hard copy of medical expense summaries for all
25 plaintiffs?"

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1 MS. DUNN: Yes.

2 MS. KAPLAN: Easy.

3 THE COURT: Can you all get that?

4 MS. KAPLAN: Of course, Your Honor.

5 MR. KOLENICH: No objection to that.

6 THE COURT: How hard? I mean --

7 MS. KAPLAN: We can shoot down and get it downstairs.

8 Is it okay just to send someone up and give it to --

9 THE COURT: Well, bring it to us and give it to Rob,
10 and then Rob can give it to the marshal.

11 MR. CAMPBELL: Obviously just the stuff that was
12 admitted?

13 MS. KAPLAN: Yeah.

14 MR. CAMPBELL: Bring it to Rob here?

15 THE COURT: Just bring it up here. We'll be here.

16 (Recess, 10:46 a.m. to 12:10 p.m.)

17 THE COURT: This is a simple question. Question 11,
18 page 8, refer also to future expenses. I think the answer to
19 that is yes.

20 And also, do compensatory damages include future
21 medical expenses? The answer to that is yes.

22 MR. CAMPBELL: Yes.

23 MS. KAPLAN: We agree, Your Honor.

24 THE COURT: That's all.

25 MS. DUNN: Thank you.

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(Recess, 12:10 p.m. to 2:24 p.m.)

THE COURT: All right. The jury thinks there is a discrepancy in the instructions and the jury form, but it's not.

They asked this question: "On page 1 of the verdict form it refers to 42 U.S.C. 1985(3). It says 'one or more' on question 1. According to U.S.C. 1985(3) line 6 says two or more. We are struggling with this discrepancy. Should on page 1 it say two or more?"

And the answer to that would be? It's nothing -- they're correct.

MS. DUNN: Can you say that one more time, Your Honor?

THE COURT: What the problem is, the instruction says -- Instruction Number 12 says you must -- first the existence of a conspiracy of two or more persons. Then question 1 on the jury form it says, "Did plaintiff prove by a preponderance of the evidence their claim that one or more defendants engaged in a conspiracy to commit racially motivated violence in violation of 42 U.S.C. 1985(3)."

Well, both are correct. But one has to do with when you're talking about individual defendants, they have to conspire with one or more persons.

MS. DUNN: Right.

THE COURT: You see? And it doesn't necessarily have

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1 to be another defendant.

2 MS. DUNN: Correct.

3 MR. CAMPBELL: Yeah.

4 THE COURT: So I would try to get Rob to write
5 something up.

6 MR. LEVINE: Your Honor, could you read into the
7 record what the question is?

8 THE COURT: "Question 1 on page 1 of the verdict form
9 refers to 48 U.S.C. 1985(3). It says 'one or more' in question
10 1. 42 U.S.C. 1985(3) line 6 says 'two or more.' We are
11 struggling with the discrepancy. Should number 1 on page 1 say
12 'two or more'?' Number 275.

13 MR. DERISE: Judge, would it help to cross reference
14 that with the verdict form?

15 THE COURT: Yes.

16 MR. DERISE: Did that make sense?

17 MR. CAMPBELL: Yeah. They can conspire with a
18 non-defendant. They seem confused over that.

19 MR. DERISE: Would it help to bring -- this is just
20 the instructions and the verdict form.

21 MS. DUNN: So their question is about question 1 on
22 the verdict form.

23 MR. CAMPBELL: Why does it say one or more --

24 MR. DERISE: Question 1, page 1 of the verdict form.

25 MS. DUNN: It says one or more, question mark.

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1 MR. DERISE: One or more engaged. And then it says
2 for the statute, line 6, I think they're talking about --

3 MS. DUNN: The instruction.

4 MR. DERISE: I think they're talking about this, the
5 existence of a conspiracy of two or more. And I think that's
6 where they're getting --

7 MS. KAPLAN: Isn't it consistent, because here it
8 says you have to have two -- sorry, I'm a little slow on the
9 uptake, Judge.

10 THE COURT: The instructions and the form are
11 correct.

12 MR. KOLENICH: We can just tell them it's possible
13 for a defendant to conspire with someone who is a
14 non-defendant.

15 MS. KAPLAN: If that's the question, we obviously
16 agree.

17 THE COURT: For those of you who are planning to go
18 home at 5:00 and never see Charlottesville again, "can we take
19 the final jury instructions home with us to study over the
20 weekend?"

21 MS. DUNN: That is such a question.

22 MS. KAPLAN: To be clear, Your Honor, I was not
23 planning to never see Charlottesville again.

24 THE COURT: I don't see anything wrong with it,
25 frankly. As long as they don't share it with anyone else and

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1 don't talk about it with anyone else.

2 MR. CAMPBELL: Or make copies of it, or that kind of
3 thing.

4 THE CLERK: Not share it with the media.

5 THE COURT: They're not supposed to be talking to
6 anyone about the case.

7 MR. LEVINE: Your Honor, would it be your practice to
8 let them take the instructions home?

9 THE COURT: I have no practice.

10 MS. KAPLAN: No one has ever asked, I assume.

11 THE COURT: It's interesting that's one of the issues
12 in the Rittenhouse case -- was it Rittenhouse or the one in
13 Florida?

14 MS. DUNN: Okay.

15 MR. CAMPBELL: We don't object to it. Maybe it will
16 help speed it along.

17 MS. DUNN: Maybe we can think about this question
18 about whether they can take it home.

19 MS. KAPLAN: There's so many people circling around
20 this that it worries us a little bit in terms of people talking
21 to them or them talking to people.

22 THE COURT: Well, you know, if they adhere to the
23 rule they're not supposed to be talking to anybody about it --
24 I imagine all of them don't want to do it. I think it's
25 probably just one or two people.

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1 MS. DUNN: I think one issue is they shouldn't be
2 asking for other people to help them understand them.

3 THE COURT: No. I think --

4 MS. DUNN: That would be very bad.

5 THE COURT: I don't think that's the issue.

6 MR. ISAACSON: I don't think it's good if one or two
7 take them home. I mean, if there really only are one or two
8 that want to study them, I think that gets away from
9 deliberations.

10 THE COURT: Well, but if they want to read them and
11 understand them, I think that's --

12 MR. ISAACSON: Someone is going to come back an
13 expert on the instructions.

14 MS. DUNN: I do think it would be good for us to
15 think about it.

16 THE COURT: You can think about it and come back. I
17 don't have any problem with that.

18 MS. KAPLAN: If they're asking the question, Your
19 Honor, I guess we're probably not getting a verdict by 5
20 anyway. So we'll give it some thought.

21 THE COURT: Excuse me?

22 MS. KAPLAN: As much as you think I don't want to
23 come to Charlottesville again, based on the last question it
24 sounds like they don't think they'll be done by 5, so we'll
25 give it some thought and come back, Your Honor.

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1 MS. DUNN: We're going to think about it.

2 MS. KAPLAN: We're going to think about it. It
3 sounds like we have time. They're not close to a verdict.

4 Thank you, Your Honor.

5 THE COURT: We're going to send them an answer.

6 MR. DERISE: I guess a proposed response: A
7 conspiracy is an unlawful agreement of two or more people.
8 Verdict form question 1 says "one or more defendants" because a
9 defendant could have been found to have conspired with a
10 non-defendant.

11 MS. DUNN: So I think here's the thing: The
12 instructions explain, like, this concept of agreement, which is
13 obviously going to be important. Can't we just make this
14 shorter that says you can conspire with a non-defendant, which
15 seems to be the question?

16 THE COURT: Well, I think you ought to refer -- I
17 mean, acknowledge that there is two different -- one says two
18 and one says one.

19 MS. DUNN: It should really be one or more. I mean,
20 isn't that -- I think the answer is you need to have -- it
21 needs to be one or more, and you can conspire with a
22 non-defendant I think are the true answers.

23 MR. ISAACSON: It would be both statements are
24 correct because a defendant can conspire with a non-defendant.

25 MS. DUNN: I think that's very confusing. They seem

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1 to be asking two things. One is: Can you conspire with a
2 non-defendant? The answer is yes. And the second is: Is a
3 conspiracy one or more, or is a conspiracy two or more? And
4 the answer is one or more. And I think --

5 THE COURT: Wait a minute, a conspiracy is not one or
6 more.

7 MR. CAMPBELL: You can't have a conspiracy of one, I
8 don't think.

9 MS. DUNN: Whether you need to conspire with two or
10 more people or one or more people. And the answer is one or
11 more.

12 THE COURT: Yes. It just takes two to conspire.

13 MR. CAMPBELL: I think they're just asking why they
14 don't line up.

15 MR. KOLENICH: I think what he wrote is a solid
16 answer for purposes of the jury.

17 MS. DUNN: I would not. I disagree, because I think
18 it injects the concept -- what I'm proposing is to say you can
19 conspire with a non-defendant. I think that's -- everyone
20 agrees on that, right? And then to have a conspiracy, a person
21 can conspire with one or more people. I think that's accurate,
22 too.

23 MR. KOLENICH: Well, one defendant has to conspire
24 with one or more --

25 MS. DUNN: To have a conspiracy, a defendant has to

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1 conspire with one or more people.

2 MR. KOLENICH: I'm all right with that.

3 MS. DUNN: Is that okay?

4 MR. KOLENICH: As long as it's clear that the other
5 people can be nonparties.

6 MS. DUNN: And the other people could be -- the one
7 or more people can be non-defendants.

8 MR. DERISE: So the anticipated response would be:
9 You can conspire with a non-defendant. To have a conspiracy, a
10 defendant has to conspire with one or more people. The one or
11 more people can be non-defendants.

12 MS. DUNN: Say the last thing.

13 MR. DERISE: The one or more people can be
14 non-defendants.

15 MS. DUNN: Yeah, that's right.

16 MR. CAMPBELL: Sure.

17 THE COURT: While you're here, "What is the
18 definition of an unlawful objective? How is that different
19 than an unlawful purpose?"

20 MS. KAPLAN: I don't think there's any difference.

21 MR. CAMPBELL: Is unlawful objective still in an
22 instruction? So that was replaced by agreement in at least 13.
23 Maybe it's somewhere else.

24 MS. DUNN: Your Honor, I think we agree that
25 objective and purpose are the same.

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1 THE COURT: Are what, the same?

2 MS. DUNN: Objective and purpose are the same thing.

3 THE COURT: All right. It says, "What is the
4 definition of unlawful objective?" Can we say it means
5 unlawful purpose?

6 MS. KAPLAN: How about an objective or purpose that
7 is not lawful?

8 MS. DUNN: I don't think that's an answerable
9 question.

10 MR. CAMPBELL: Yeah, I tend to agree with that. The
11 definition, you can't really answer. But I think you can say
12 yes, they're the same.

13 THE COURT: Those questions this morning about
14 Heimbach and Kline, they were brought in before we came into
15 the courtroom. And I thought I answered it. I told them that
16 they had to decide the case. Did I refer to -- I don't know
17 that I referred to the instruction or not. I tried to tell
18 them they had to -- they ultimately had to decide the verdict.
19 I think I made an effort.

20 MR. DERISE: But then they subsequently said that
21 they had no pending questions.

22 MS. KAPLAN: Okay. So that makes sense, Your Honor.

23 MS. DUNN: So are we -- is there more to do on this?

24 THE COURT: I don't have any questions. I guess
25 that's it.

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1 MS. DUNN: Who asked the last question?

2 THE COURT: The last question was not the foreman, at
3 least it's not the person that's been writing it.

4 THE CLERK: The last ones were 275.

5 THE COURT: Juror 164 wrote, what is the definition?
6 Heidi, you have the other one.

7 THE CLERK: Yes. Do you want them?

8 THE COURT: No. She wants to know.

9 THE CLERK: 275 was the last ones.

10 MS. KAPLAN: 275 was which one, Your Honor?

11 THE COURT: 164 wanted to know the definition.

12 THE CLERK: These were both by 275.

13 MS. KAPLAN: 275 wanted to bring it home.

14 MS. DUNN: It says "can we." So who knows if it's on
15 behalf of themselves.

16 MS. KAPLAN: But the question was posed by 275?

17 THE CLERK: Yes.

18 MS. KAPLAN: We're downstairs if you need us.

19 THE COURT: Thank you all.

20 (Recess, 2:44 p.m. to 3:02 p.m.)

21 THE COURT: Here's the question. "Judge Moon, does
22 the plaintiff have to prove all five elements for each person?"
23 Juror 164.

24 MS. KAPLAN: 164?

25 THE COURT: I don't know whether the question has a

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1 deeper meaning.

2 MR. KOLENICH: Are they asking do they have to find
3 against all defendants to find against --

4 THE COURT: They just say, "Does the plaintiff have
5 to prove all five elements for each person?"

6 MS. DUNN: The answer to me, this seems no because if
7 you look at these --

8 MR. MILLS: They don't each have to do an overt act,
9 for example.

10 THE CLERK: Do you want this on the public line or to
11 the attorneys on Zoom?

12 THE COURT: Just the attorneys.

13 MR. CAMPBELL: Four makes it clear that only one
14 person has to commit an overt act. So I think the answer is
15 yes.

16 MS. KAPLAN: The answer is no, given 4, because four
17 means each defendant doesn't have to have done an overt act.

18 MR. CAMPBELL: But you still have to prove 4 that one
19 defendant did and by proving that it inversely implies that you
20 don't have to prove every defendant did.

21 MS. DUNN: Yeah, I think this is --

22 MS. KAPLAN: I think we could say yes --

23 MS. DUNN: No. The answer is not yes.

24 MS. KAPLAN: I was going to explain something. I was
25 going to say maybe the answer is under -- what's this called --

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1 do they call these points four, Judge?

2 MR. KOLENICH: Elements.

3 THE COURT: They don't refer to --

4 MS. KAPLAN: What if we say that under element 4 --
5 with respect to element 4, only one member of the conspiracy
6 has to have committed an overt act. I think that's what
7 they're asking.

8 MS. DUNN: No. What they're asking --

9 MR. CAMPBELL: That's what 4 says.

10 MS. DUNN: What they're asking is, do we have to
11 prove each of these things with respect to everybody? And the
12 answer is no. That's not what this is saying. If it were
13 saying that, it would be inconsistent with all the rest of the
14 instructions that then follow.

15 MS. KAPLAN: I agree with that.

16 MS. DUNN: So I'm not sure. Why don't we think about
17 whether this question can be answered, but the answer -- if we
18 said yes, we would nullify all of the rest of the instructions,
19 pretty much.

20 MR. CAMPBELL: Disagree.

21 MR. MILLS: What about: No, but it is important to
22 read the whole thing, and then send that instruction.

23 MR. CAMPBELL: I disagree. I think it's yes.

24 THE COURT: I mean, you have to prove all the
25 elements have to apply. You don't have to prove like the overt

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1 act.

2 MS. KAPLAN: But one of those elements is an overt
3 act. That's why it's so complicated.

4 MS. DUNN: What about if we said each of these
5 elements is explained in the jury instructions, because I don't
6 think -- I think more is going to be even more confusing,
7 honestly. I mean, each one of these things is explained, and
8 in a lot of words. So my vote would just be to say like each
9 of these things is explained in the jury instruction.

10 THE COURT: Did you all agree on a suggestion?

11 MR. CAMPBELL: No.

12 MR. KOLENICH: No. We're in disagreement.

13 MR. CAMPBELL: So the instruction says, "To prove
14 this claim, plaintiffs must prove first the existence of a
15 conspiracy of two or more persons; second, motivated in whole
16 or in part by animus; third, purpose of the conspiracy is to
17 deprive plaintiffs of their right to be free from racially
18 motivated violence; fourth, at least one person involved in the
19 conspiracy took an overt act."

20 So it already says you don't have to prove an overt
21 act for every one in the instruction as it is. It specifically
22 says only one person involved in a conspiracy. Plaintiffs just
23 have to prove one person involved in a conspiracy --

24 MS. KAPLAN: But even the last one, Dave, as I recall
25 is that the plaintiffs were damaged. That doesn't apply to

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1 every defendant, either. So it kind of doesn't make sense.

2 You don't have to show that every defendant somehow damaged the
3 plaintiffs.

4 MR. KOLENICH: We all understand that, but it's
5 possible there is a juror who doesn't understand that they can
6 find for some defendants and find other defendants liable. I
7 think that should be explicit in the answer.

8 MS. DUNN: That's why I think the safest course that
9 doesn't create additional trouble is to say each of these
10 things is explained in the instructions.

11 MR. CAMPBELL: Not say yes or no.

12 THE COURT: All right. Once you all agree, let me
13 know.

14 Do you have the question?

15 MR. LEVINE: Your Honor, could it be read to us one
16 more time.

17 MS. DUNN: Could we just talk for one second?

18 THE COURT: Okay.

19 MS. DUNN: Thank you, Your Honor.

20 (Discussion off the record.)

21 THE COURT: What about if you say for any defendant
22 you hold liable, all five elements must be proven?

23 MR. CAMPBELL: I like that.

24 MS. KAPLAN: I'm sorry?

25 THE COURT: For any defendant you hold liable, all

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1 five elements must be proven.

2 MS. DUNN: I don't think that's right, Your Honor.

3 There are two things. In 4, there is an overt act. So only
4 one defendant out of --

5 THE COURT: No, but it doesn't say -- it says to be a
6 conspiracy, there must be an overt act. It doesn't say the
7 particular defendant has to commit the overt act.

8 MS. DUNN: But we think that's what the question may
9 be asking, and we think it's confusing.

10 Mr. Mills has a suggestion.

11 MR. MILLS: I think what you're saying would be fine
12 if it's -- in order to find a defendant a member of the
13 conspiracy, all five elements must be found to be true;
14 however, not each defendant needs to have committed elements 4
15 and 5. Elements 4 and 5 can be committed by any member of the
16 conspiracy.

17 MS. KAPLAN: That's clearly true.

18 THE COURT: Is that inaccurate?

19 MR. CAMPBELL: What's 5?

20 MS. DUNN: Five is injury.

21 MR. CAMPBELL: Yeah, that's fine.

22 MR. MILLS: We can write it down.

23 MS. KAPLAN: Is someone writing that down?

24 MS. DUNN: David is writing it down.

25 (Discussion off the record).

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1 MS. DUNN: Your Honor, would you like us to stay
2 here?

3 (Recess, 3:24 p.m. to 4:27 p.m.)

4 THE COURT: Here's the question: "Can we have a
5 transcript of Matthew Parrott's testimony?" Number 275.

6 MS. DUNN: We can get that.

7 MR. CAMPBELL: I would say no. I don't think we want
8 to open that door and have them start reading transcripts of
9 the trial. I think they have to go off their memory.

10 MR. SMITH: I think you're right. Jurors aren't
11 supposed to take transcripts into the jury room.

12 MS. DUNN: We are fine if they want the transcript.

13 THE COURT: Okay.

14 MR. CAMPBELL: The defense is not. I mean, that
15 could lead to them wanting every transcript in the case.

16 MR. SMITH: Your Honor, we object.

17 THE COURT: I think I told them when we started out
18 transcripts would not be available.

19 MR. CAMPBELL: I think so, too, Judge.

20 MR. SMITH: We should stick with that.

21 MR. CAMPBELL: If they start trying to break a tie
22 between what two people recall in a transcript, then the next
23 time they have any sort of disagreement it's going to be the
24 next transcript.

25 MR. SMITH: This is exactly why that rule exists.

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1 MS. DUNN: We would also be okay if they have
2 specific questions, maybe that is the way to get their
3 questions answered.

4 THE COURT: In the preliminary instruction, do you
5 recall if we had -- I think it's in there about the instruction
6 about transcripts, right?

7 MR. DERISE: I recall that from earlier in the case.

8 THE COURT: Generally -- I've had this before, and I
9 don't have any rule one way or the other, but I know in this
10 case we told them it would not be available. But generally if
11 you put in evidence on one side, you've got to balance it with
12 evidence on the other.

13 If they ask a specific question -- I mean, the
14 transcript itself, how long did he testify?

15 MR. SMITH: It's a long transcript, Judge.

16 THE COURT: I'm just going to tell them, as I told
17 you at the beginning of the trial, the transcript would not be
18 available.

19 MR. SMITH: Thank you, Your Honor.

20 MS. DUNN: We're checking to see what was said. I
21 don't know if you remember. I also think if they have specific
22 questions, that's different.

23 THE COURT: Well, I take that up differently.

24 MR. SMITH: You could handle that at the time, if
25 that happens. It's premature.

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1 MR. LEVINE: Judge, you might say in the answer if
2 they have specific questions, then the Court would consider
3 having testimony read to them to answer those questions.

4 MR. SMITH: I feel like that could open up a torrent
5 of that.

6 MR. LEVINE: So what? Then we would know what they
7 would like read, which happens all the time.

8 MR. SMITH: Right, what really pertains to that,
9 because it's testimony on one side, testimony on both sides.
10 It's impossible to be able to --

11 MR. LEVINE: It's never impossible. It happens all
12 the time.

13 MR. CAMPBELL: I recall the judge advising the jury
14 at the beginning as well that they could take notes. They
15 wouldn't have access to transcripts.

16 MR. SMITH: I don't see why we shouldn't stick with
17 that.

18 MS. DUNN: We're going to look it up.

19 THE COURT: Are you looking?

20 MS. DUNN: We are looking.

21 THE COURT: You're going to have to rely -- here it
22 is.

23 "Recalling the evidence is very important because
24 this is not -- this is not a situation sometimes you might see
25 on TV or something where you will have a transcript of what

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1 went on in the courtroom. You're going to have to rely totally
2 upon the collective memory of the jury when you decide the
3 case."

4 MR. SMITH: Thank you, Judge.

5 THE COURT: If they do come back and ask for a
6 specific question, I'd be inclined to do it.

7 MS. KAPLAN: I'm sorry, Judge, I didn't hear.

8 THE COURT: If the jury comes back and says something
9 specific --

10 MS. KAPLAN: Understood.

11 MR. SMITH: We can convene then and figure out how to
12 deal with that.

13 MR. ISAACSON: You can also obviously read back
14 transcript to them on topics.

15 MS. DUNN: I would suggest that we say to them: Do
16 you have a specific question? Because they clearly have a
17 question, and it does seem like they should not get the whole
18 transcript. That's clear from Your Honor's instruction.

19 MR. SMITH: That is the situation that the jury finds
20 themselves in. That is what we said we would be doing.

21 MS. DUNN: I understand. What I'm saying -- Your
22 Honor, what I'm saying is they obviously have a question about
23 something. You could say, is there -- you know, if you have a
24 specific question, we could take that up.

25 MR. SMITH: This is fine. Was this the proposed

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1 instruction for that question? It's fine.

2 THE COURT: All right. I'm telling them: As you
3 were instructed at the beginning of the trial, transcripts of
4 testimony are not available. You must rely upon the collective
5 memory of the jury.

6 That's all. I just don't want to encourage them to
7 think they can keep coming back.

8 MS. DUNN: Your Honor, the jury earlier asked whether
9 they could take the jury instructions home for the weekend. We
10 would suggest waiting to answer that question until they decide
11 that they're done, because I think if we answer that question
12 too soon, they will stop deliberating and Your Honor told them
13 that they could stay longer if they would like. So I think
14 when they come back and say we'd like to leave, then we --

15 THE COURT: I agree with you.

16 MR. SMITH: We agree with that, Your Honor.

17 THE COURT: I'm not going to tell them until --

18 MS. DUNN: Right. We have a proposal for an
19 instruction if the jury is going to be permitted that I can
20 hand up. And the defense has seen it.

21 MR. SMITH: It's fine, Judge.

22 (Pause.)

23 THE COURT: That's good. I'll do that.

24 MS. DUNN: Thank you, Your Honor.

25 MR. SMITH: Thanks.

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1 THE COURT: Thank you all.

2 (Recess, 4:40 p.m. to 4:58 p.m.)

3 **(Jury in, 4:58 PM**

4 THE COURT: All right. Members of the jury, everyone
5 may be seated.

6 I understand you'd like to retire for the day. A
7 question was asked if you could take the jury instructions
8 home. I don't recommend that you do. It's okay -- it's okay
9 that you do, except I have to give you this instruction: I
10 will permit you to take jury instructions home over the
11 weekend. You must not discuss the jury instructions with
12 anyone or show the instructions to anyone. Do not do any
13 research or make any investigation about the facts or law in
14 this case. As you have previously been instructed, do not
15 discuss the case with anyone or permit anyone to discuss it
16 with you. This includes your family, friends, and those with
17 whom you work, as well as your fellow jurors.

18 Until you return to the jury room on Monday morning
19 to continue deliberating on your verdict, you simply are not to
20 talk about this case, and, of course, you are not to read this
21 and watch anything concerning the case over the weekend.

22 I want you to know we appreciate very much the
23 hardship this is on you and how hard a job it is. All we can
24 say is we're grateful. And I'm going to excuse you now until 7
25 a.m. -- I'm sorry, 9 a.m. Monday morning. So you're excused.

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1 (Jury out, 5:00 p.m.)

2 C E R T I F I C A T E

3 I, Lisa M. Blair, RMR/CRR, Official Court Reporter for
4 the United States District Court for the Western District of
5 Virginia, appointed pursuant to the provisions of Title 28,
6 United States Code, Section 753, do hereby certify that the
7 foregoing is a correct transcript of the proceedings reported
8 by me using the stenotype reporting method in conjunction
9 with computer-aided transcription, and that same is a
10 true and correct transcript to the best of my ability and
11 understanding.

12 I further certify that the transcript fees and format
13 comply with those prescribed by the Court and the Judicial
14 Conference of the United States.

15 /s/ Lisa M. Blair

Date: November 19, 2021